

STANFORD UNIVERSITY

TO: Members of the Faculty, Hoover Institution Fellows, Senior Fellows, Department Administrators, Academic Staff (teaching and research), Library Directors, Students and Administrative Staff

FROM: John Etchemendy, Provost

DATE: Fall 2005

SUBJECT: Copyright Reminder

The attached information sheets are intended to update and remind the University community of the applicability of copyright law at an academic institution like Stanford. Since this Copyright Reminder was last issued in Fall 2004, the intersection of copyrighted works and their use in digital formats continues to command attention at universities across the country.

Entertainment coalitions such as the Recording Industry Association of America and the Motion Picture Association of America continue to battle illegal file-sharing through peer-to-peer networks both by lodging complaints to Internet Service Providers and by filing lawsuits. This Copyright Reminder includes an expanded section on unlawful file-sharing and its potential consequences at Stanford, as well as through civil and criminal actions.

In an effort to give students more opportunity to access a large music catalog both legally and economically, Stanford has partnered with Yahoo! Music Unlimited to offer a free pilot for their subscription music service for the 2005-06 academic year. ASSU is also working with Apple to create an affiliate program so that when songs are purchased through the ASSU link to iTunes, a portion of the revenues will be donated to Habitat for Humanity to support Hurricane Katrina relief efforts. You may find more information on both of these music options at mymusic.stanford.edu.

In 2005, the American Association of Publishers raised concerns that universities provide digital copies of copyrighted materials to students via electronic coursepacks without paying appropriate royalties. As discussed more fully within this Copyright Reminder, Stanford University encourages faculty to employ Stanford's CourseWork software, which allows the posting of materials only after a review of copyright status is undertaken.

This Reminder covers:

- BASIC COPYRIGHT PRINCIPLES
- THE FAIR USE DOCTRINE
- FACE-TO-FACE TEACHING ACTIVITIES
- DISTANCE EDUCATION
- THE INTERNET & COPYRIGHT PRINCIPLES
- ELECTRONIC COURSEPACKS
- THE DIGITAL MILLENNIUM COPYRIGHT ACT & PEER-TO-PEER FILE-SHARING
- OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL
- LIBRARY COPYRIGHT CONSIDERATIONS
- RESOURCES ON COPYRIGHT AND FAIR USE

If these informational sheets and the listed resources do not address your specific copyright concerns, please feel free to contact Lauren Schoenthaler at lks@stanford.edu in the Office of the General Counsel for assistance.

BASIC COPYRIGHT PRINCIPLES

The Law. Copyright laws protect original works of authorship. The Copyright Act gives the owner of a copyright the exclusive right to do and authorize others to do certain things in regard to a copyrighted work, including: make copies, distribute the work, display or perform the work publicly, and create derivative works. These exclusive rights are subject to only limited exceptions.

Scope of Copyright. Copyright laws apply to nearly all forms of captured content, including traditional works like books, photographs, architectural drawings, music, drama and sculpture. The laws also adapt to changes in technologies, and include in their scope modern forms of works like motion pictures, electronic media, software, multimedia works and some databases.

No Mark or Registration Necessary. A copyright interest attaches to an original work that is “fixed in any tangible medium of expression” (i.e., a medium that is captured in an accessible form of content) at the work’s creation. Registration is not required to obtain a copyright, though registration may be required to enforce a copyright in federal courts. Works published after 1989 also do not need to have a copyright notice to enjoy copyright protection. So if in doubt, assume copyright applies.

Public Domain Works. Not all works enjoy copyright protection, and all works eventually fall into the public domain. Certain classes of works, such as United States (but not state or local) government works and databases of facts, do not receive copyright protection. They are in the public domain and may be freely used. Once the copyright in a work expires, that work also falls into the public domain. Any work published in the United States before 1923 is in the public domain. Works published from 1923 through 1978 are protected for 95 years from the publication date, if proper copyright formalities were followed. Since 1978, works generally have copyright protection for the life of the author plus 70 years. Stanford encourages the use of Public Domain materials that are widely available on the Internet.

If No Exception, Seek Permission. Unless an exception to the copyright owner’s exclusive rights applies, you must obtain permission from the copyright owner to copy, distribute, display or perform a copyrighted work in any medium for any purpose. In academia, the four major exceptions to the copyright owner’s exclusives rights are: the fair use exception, the library exception, the face-to-face teaching exception, and the distance-learning exception. These four exceptions are described below. Note that there is no over-arching copyright exception for academic uses; academic journals and text publishers expect royalties for use of their content.

Penalties. The penalties for copyright infringement can be harsh. Under the Copyright laws, a court may award up to \$150,000 in civil statutory damages for each separate willful infringement; copyright infringement can also be a crime under federal law. Under Stanford policies, violation of copyright law may result in administrative action, such as loss of networking privileges and SUNet ID, or disciplinary action up to and including termination for faculty and staff and expulsion for students.

THE FAIR USE DOCTRINE

Fair Use Defined. The Fair Use Doctrine provides for limited use of copyrighted materials for educational and research purposes without permission from the owners. It is not a blanket exemption. Instead, each proposed use must be analyzed under a four-part test.

Fair Use Applied. Unfortunately, the four-part test to determine fair use is necessarily vague and fact-dependent. In some instances, two reasonable people could apply the four factors to the same facts and reach opposite conclusions. If the weighing and balancing analysis below does not provide an answer, please refer to the Copyright and Fair Use Resources section below.

Fair Use Four Factor Test.

- 1. What is the character of the use?** Educational, nonprofit and personal use is favored for fair use, while commercial use is disfavored. However, the fact that a use is educational or nonprofit in nature does not in and of itself mean the use is necessarily fair. More important than the educational or nonprofit nature of the use is whether the use is “transformative” in nature. A use is transformative if it builds upon, criticizes, comments on, parodies or otherwise adds something new to the original work. Put another way, the question is whether the new use, in the words of the Supreme Court, merely “supercedes the objects of the original, or instead adds something new, with a further purpose or different character.”
- 2. What is the nature of the work to be used?** Use of a work that is factual in nature weighs toward a finding of fair use. Use of imaginative works is more likely to require permission.
- 3. What is the amount and substantiality of the portion to be used?** Using only a small portion of a copyrighted material tips towards fair use, while using large portions indicates a need for permission. Be careful with this factor, however; a court has held that copying only 5% of a book into a coursepack was not fair use.
- 4. Will the use negatively affect the value of the copyrighted material?** Where a work is available for purchase or license from the copyright owner, copying all or a significant portion of the work (in lieu of purchasing or licensing a sufficient number of “authorized” copies) would likely be unfair. If only a small portion of a work is to be copied, and one would likely forego using the portion if permission were required, then the balance tips towards fair use.

Good Faith Fair Use Defense. Even if a copyright infringement occurs, a court may refuse to award damages if the infringer reasonably believed that the use was fair.

FACE-TO-FACE TEACHING ACTIVITIES

Performance or Display of Copyrighted Materials During Face-to-Face Teaching. In addition to the fair use exemption, the Copyright Act does provide an exemption to perform or display copyrighted materials during face-to-face teaching activities. Such use does not require the author’s permission. Note, however, that this exemption does not permit copying or distributing a work—only displaying or performing it.

DISTANCE EDUCATION

Distance Learning and the TEACH Act. In November 2002, the Technology, Education and Copyright Harmonization (TEACH) Act took effect. That act extends in a limited way the Face-to-Face Teaching exemption to distance learning activities. Provided the requirements of the Act are followed, transmissions of performances of entire non-dramatic works and reasonable and limited portions of any other performance or audiovisual work may be made without obtaining permission from the copyright owner. To take advantage of the Act, you must abide by the following strict requirements:

The performance or display must be:

- 1) A regular part of mediated instructional activity;
- 2) Made by, at the direction of, or under the supervision of the instructor; and
- 3) Directly related and of material assistance to the content of the course.

Further, the following technological restraints must be in effect:

- 1) The content must be accessible only to those students who are enrolled in the course;
- 2) The content must be accessible only for the duration of a class session;
- 3) To the extent technologically possible, the content must be protected from further distribution (“downstream-controlled”); and
- 4) To the extent technologically possible, the content must not be subject to retention by students.

All material displayed under the TEACH Act must contain the following notice:

The materials on this course website are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. The materials on this course website may be protected by copyright; any further use of this material may be in violation of federal copyright law.

You may digitize works for display from an analog format provided that:

- 1) No existing licensed digital copy is available for use at the University; and
- 2) Only the portion needed for transmission is digitized (i.e., only a reasonably limited portion).

Note: The TEACH Act does NOT permit:

- 1) Uploading material such as textbooks, coursepacks or other resources typically purchased by students to review outside of the classroom. (The TEACH Act only applies to works that an instructor would show or play during class. Any uploading of material for (non-classroom) study purposes must comply with the copyright laws, including fair use principles, and SUL’s E-Reserve policies).
- 2) Uploading materials specifically marketed as distance education courses.
- 3) Uploading material that was obtained illegally.

To display materials under the TEACH Act, please contact Kim Hayworth kimhwrth@stanford.edu, Academic Technology Consultant in Academic Computing at Meyer Library for assistance with the technology. Additionally, Georgia Harper, an attorney in the General Counsel’s Office at the University of Texas has developed an excellent checklist to determine if “you are ready to use the TEACH Act.” <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>; see also North Carolina State University’s Teach Act Toolkit, available at <http://www.lib.ncsu.edu/sccl/legislative/teachkit/overview.html>. Our designated TEACH Act agent is Lauren Schoenthaler, Senior University Counsel, at teachactagent@standford.edu or (650)723-9611.

THE INTERNET AND COPYRIGHT PRINCIPLES

In General. Digitally created works and analog works transformed into a digital format and placed on-line or on the Internet are still protected by the copyright laws.

Exercise Caution. Be especially careful of copyright/fair use principles when downloading material from the Internet. Just because a work is posted on the Internet does not mean that the owner of the copyright in it has given you permission to use it. Note too that material may have been placed on the Internet without the author's permission.

The Fair Use Doctrine. When dealing with an electronic use of a work, in addition to the traditional four fair use factors, you should consider the following additional concern:

- 5. Is access to the material limited or protected?** It is a violation of law to circumvent an access control mechanism and use copyrighted material — even if the use would otherwise be fair — except in very limited circumstances. For providing access to digital works that you have lawfully obtained, limiting access to a small audience by using passwords or other access control devices weighs toward a finding of fair use.

Protect the Copyright. Electronic distribution of a copyrighted work should state: This work is protected by copyright laws and is provided for educational instruction only. Any infringing use may be subject to disciplinary action and/or civil or criminal liability as provided by law.

Link to it. Providing a link to a copyrighted work is not making a copy of that work, and therefore outside of the bounds of copyright law. It is generally acceptable to point others to material posted on the Internet by providing a link to the website. The exception is that it could be contributory infringement to provide a link to a website knowingly hosting copyrighted material unlawfully.

ELECTRONIC COURSEPACKS

Electronic CoursePacks and CourseWork Software. Increasingly faculty and students are finding that having a central website portal for access to class information and reading lists is an essential part of course management. Faculty and students may post or link to copyrighted materials on password protected course sites only in compliance with copyright principles. Prior to scanning or digitizing copyrighted materials, faculty should review SUL's electronic holdings to determine if a pre-existing license for the content already exists. Similarly, instead of creating a digital copy of a work, where possible, faculty members are encouraged to provide links to the content-owner's website, such as to a news-service, or alternatively to a public domain site. If these options are not available, digitizing content is acceptable in limited circumstances. The faculty member must consider whether the use is a fair use, such as a single, recent news article, or a few images, or whether permission is necessary from the copyright owner, such as a few chapters from a textbook. A sound guideline is if copyright clearance were necessary to place something into a coursepack, then copyright clearance is necessary to place it into an e-reserve. The preferred method for creating an e-reserve at Stanford is through CourseWork, which is located at <http://coursework.stanford.edu/>. CourseWork provides a web-based document bank and password-protected access system to course participants only. For more information about putting together a Coursepack, please see, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter7/7-a.html.

THE DIGITAL MILLENNIUM COPYRIGHT ACT & PEER-TO-PEER FILE-SHARING

In General. The DMCA provides limited protection for Internet Service Providers (ISP), such as Stanford, from the infringing acts of their users provided that the ISP comply with the DMCA, including responding to copyright infringement complaints and establishing a procedure to terminate repeat copyright infringers from the ISP. It also prohibits gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner to control access to the work. Such circumvention is normally prohibited even if the use of the work would otherwise be a fair use. The DMCA also prohibits trafficking in technology or devices that are primarily designed to circumvent such a technological protection.

File-Sharing under the DMCA. The use of file-sharing networks to download and share copyrighted works without permission from the copyright owner -- like software, music, movies, TV shows, games and images -- for personal enjoyment violates copyright laws. Both the person who makes an illegal copy of a copyrighted work available and the person who receives or downloads an illegal copy have violated copyright laws and Stanford policies. Under the DMCA, a copyright owner or an authorized agent may lawfully scan Internet traffic and send a complaint to Stanford as the ISP. If the copyright owner chooses to follow-up with civil litigation, it may file a "John Doe" lawsuit against the IP address, and Stanford would have to provide the identity of the Stanford network user in response to a valid subpoena. Copyright violations can result in penalties of up to \$150,000 per violation. Stanford policy, in Administrative Guide Memo 62 (<http://adminguide.stanford.edu/62.pdf>), prohibits the copying or distributing of copyrighted materials without permission. Stanford follows up and responds to every DMCA complaint. If an individual at Stanford receives more than one DMCA complaint, the matter is referred for consideration of further disciplinary action: for undergraduate students, the matter is referred to a residential dean; for graduate students and faculty, the matter is referred to a Department Chair; and for staff on a first and second DMCA complaint, the matter is referred to a supervisor and to HR. Upon receipt of a very rare third DMCA complaint, administratively, Stanford terminates Internet connectivity, including disabling the SUNet ID, and the matter is referred on for discipline: students are referred to Judicial Affairs; faculty are referred to the Provost; and staff are referred to HR and can expect to be terminated. For more information, please refer to Residential Computing's file-sharing website, <http://rescomp.stanford.edu/info/dmca/> and the Provost's Letter to the Stanford Community of September 2004, http://www.stanford.edu/dept/legal/Worddocs/Provost_ltr.pdf

mymusic@stanford.edu. Legal music choices are available to Stanford students in pilot programs being offered in the 2005-06 academic year. Students may sign up for Yahoo! Music Unlimited subscription music services that offers over 2 million songs, which may be downloaded to Windows PCs and compatible portable music players. ASSU is working with iTunes to create an affiliate program, which results in a donation of a portion of all sales through the ASSU link as directed by ASSU. For more information, please visit mymusic@stanford.edu.

OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL

In General. If an exception (such as fair use, the library exception, face-to-face teaching activities or distance education) is not clearly available, permission to use a copyrighted work must be obtained from the owner of the copyright holder. A request to use copyrighted material usually can be sent to the permission department of the publisher of the work. Assume four to six weeks for a request to be processed. Permission requests should contain

1. Title, author and/or editor, and edition.
2. Exact material to be used.
3. Number of copies to be made.
4. Intended use of the material, e.g., educational.
5. Form of distribution, e.g., hard copy to classroom, posted on Internet with password protection.
6. Whether material is to be sold (e.g., as part of a coursepack).

Journal Articles. The Stanford libraries have blanket copyright permission from many journals. Before forwarding a request for an article, check with the appropriate library to see if there is a blanket permission covering the article you would like to use.

Copyright Clearance Center (CCC). The CCC is able to give permission to use a wide number of materials for a fee. Please contact CCC at www.copyright.com or (978) 750-8400.

Evidence of Permission. Written permission should be obtained and kept by the academic department. If oral permission only is obtained, a written record should be kept of the oral permission.

LIBRARY COPYRIGHT CONSIDERATIONS

Library Exemption for Reproduction of Copyrighted Works. Copyright laws provide certain exemptions for libraries and archives to reproduce copyrighted works.

Filing a Course Reserve. Some libraries at Stanford will not accept multiple photocopies of copyrighted materials needed for course reserves without first having permission from the copyright holder. Other libraries on campus will accept a limited number of photocopies for course reserves. Consult individual libraries for their policies. The Green Library policy on course reserve is located at <http://www-sul.Stanford.edu/services.html>.

Allow Several Months for Course Reserve Permission. Note that filling course reserve requirements may take two to three months before the quarter begins if the library does not already have a copy of the publication and copyright permission is needed.

Contact. For further questions about the library exemption, library policy and course reserves, please contact:

Print Reserves: office (650) 723-2201, fax (650) 723-3992
Ajit Gellon, Print Reserves Processing Supervisor, (650) 725-2191, agellon@stanford.edu.
Guidelines for submitting print lists and electronic form for submitting print materials

Media Reserves: office (650) 723-9394, fax (650) 723-3992
Joe Leggett, Media and Reserves Specialist, (650) 725-1179, jleggett@stanford.edu
Guidelines for submitting media materials and electronic form for submitting media lists

For information about reserve operations in campus libraries, contact the relevant library (see <http://library.stanford.edu/geninfo/libraries.html>)

RESOURCES ON COPYRIGHT AND FAIR USE

Stanford's Copyright Ownership Policy. The University's copyright ownership policy establishes that all rights in copyright, regardless of their form of expression, remain with the creator, except in specified cases where law or University policy require otherwise. For more information, please refer to the policy at <http://www.stanford.edu/dept/DoR/rph/5-2.html>

Stanford's Fair Use Resources. Further guidelines and useful material are located at <http://fairuse.stanford.edu>.

Guidelines for Classroom Copying. These guidelines were prepared by the Authors League of America and the Association of American Publishers. http://caselaw.lp.findlaw.com/cascode/uscodes/17/chapters/1/sections/section_107.html.

Guidelines for Educational Multimedia. These guidelines were prepared by the Consortium of College and University Multimedia Centers. <http://www.libraries.psu.edu/mtss/fairuse/default.html>.

Further Assistance. Please contact Lauren Schoenthaler in the Office of the General Counsel at lks@stanford.edu.